

**COURT OF APPEALS OF INDIANA
ORAL ARGUMENT AT A GLANCE
SAINT MARY-OF-THE-WOODS COLLEGE
CONSERVATORY**



Anna Williams, et al. v. M. Jayme Adelsperger, D.D.S.

Appeal from:
Marion County Superior Court,
The Honorable
David Dreyer, Judge

Oral Argument:
Tuesday, November 17, 2009
10:30 a.m.
20 minutes each side

MEDICAL MALPRACTICE ISSUE

*The Court of Appeals of Indiana is asked to examine
two questions in this appeal of summary judgment:*

The medical malpractice statute of limitations requires a claim be filed within two years of the negligent act. But a patient who cannot discover the malpractice within that period may sometimes file a claim within two years of the date when she *discovers* the malpractice or learns facts that should lead to the discovery of the malpractice. When a patient suspects malpractice, but has not been explicitly told by another doctor that there might have been malpractice, does she have enough information that “should lead to the discovery” of the malpractice?

Under the doctrine of fraudulent concealment, a doctor who has prevented a patient from discovering a valid malpractice claim cannot raise a statute of limitations defense. Is there fraudulent concealment when a doctor tells the patient her treatment had been appropriate, and advises the patient not to go to certain specialists?

CASE SYNOPSIS

Facts and Procedural History

Anna Williams brought a medical malpractice action against Dr. Jayme Adelsperger (“the Doctor”). The Doctor moved for summary judgment based on the statute of limitations for medical malpractice, because more than two years passed between August 29, 2002 — the last date the Doctor treated Williams — and December 2, 2004, the date Williams filed her claim. The trial court granted the Doctor’s motion.

Williams alleged the Doctor failed to diagnose temporomandibular joint dysfunction (“TMJ”) in treating Williams, causing Williams pain and suffering and permanent injuries.

Williams, then ten years old, first saw the Doctor in June of 1999 after she was told she needed braces. The Doctor believed Williams’s temporomandibular joints were “asymptomatic, functioning within normal

Anna Williams, et al. v. M. Jayme Adelsperger, D.D.S.

CASE SYNOPSIS

limits.” Williams began orthodontic treatment with the Doctor. By July 2001 she began experiencing pain when she opened her mouth wide. The Doctor prescribed pain medicine, and when the pain continued the Doctor indicated the pain was related to the development of wisdom teeth.

X-rays taken in December 2001 showed flattening of a rounded surface on a jaw bone, a preliminary indicator of TMJ, but the Doctor continued treatment with braces. In May of 2002, Williams experienced pain and associated “clicking and popping” in both jaws. Clicking and popping are indicators of internal dislocation of the temporomandibular joint. In July 2002, Williams returned to the Doctor with more clicking and popping complaints and a locking sensation. The Doctor “suspected” temporomandibular malfunction, and employed what she characterized as “conservative methods” to treat the problem. These included a soft mouth guard and a repositioning splint. A dentist who later treated Williams said soft mouth guards are known to exacerbate many types of TMJ. The Doctor did not refer Williams to a TMJ specialist, but asked Williams if she was grinding her teeth, and instructed her to take painkillers.

In August 2002, the Doctor told Williams’s mother that Williams had a muscle problem, not a joint problem, and implied Williams was exaggerating her complaints. That office visit was the last time the Doctor treated Williams, but two days later Williams experienced jaw pain while running, eating, and yawning. The Doctor recommended she continue wearing the splint. Three days after that, as Williams’s symptoms worsened, the Doctor referred Williams to Dr. Heidi Crow.

The Doctor told Dr. Crow she did not think Williams’s problems were TMJ related, but instead might be a whiplash-type injury. Dr. Crow adjusted Williams’s splint and prescribed muscle relaxants, and when that did not help, she told the family the symptoms were psychosomatic, or Williams might have lupus, but she did not have TMJ. Williams’s family disagreed with that diagnosis, and in October 2002 sought treatment from Dr. Amy Liu at Pain Management Specialists of Indianapolis.

Dr. Liu concluded Williams had several conditions, including TMJ. She referred Williams to a TMJ specialist, but when Williams’s mother contacted the Doctor to discuss Dr. Liu’s diagnosis, the Doctor again assured Williams’s mother Williams did not have TMJ and advised her not to go to the specialist because the specialist was “money hungry.” Williams’s mother then got another referral from Dr. Liu, but the Doctor said that specialist was “not the right person” to treat Williams. Williams never saw either of the TMJ specialists. Williams’s parents said Williams’s symptoms continually deteriorated under the Doctor’s care.

In December 2002, on the advice of a friend, Williams’s family took her to orthodontists Anoop Sondhi and Jeffrey Biggs, who put Williams on splint therapy. Where the intake questionnaire asked why the consultation was sought, Williams’s mother wrote “Referral – prior insufficient care.” Where it asked “Has patient ever been treated for this problem before?” she wrote “Suspected TMJ – splints made – exasperated [sic] problem.” In July 2003, Doctors Sondhi and Biggs suggested an MRI. The results led them to refer Williams to Dr. Buttram of Indiana Oral

Anna Williams, et al. v. M. Jayme Adelsperger, D.D.S.

CASE SYNOPSIS

and Maxillofacial Surgery Associates. He concluded Williams had a number of conditions including TMJ, and he performed two surgeries. By February 2005, Williams's braces had been removed and her pain was gone.

Because the MRI revealed temporomandibular joint damage, Williams's father met with the Doctor in September of 2003, and the Doctor told him her treatment had been appropriate and she had met the standard of care in treating Williams. Williams's father suspected the Doctor had been negligent, and he asked the Indiana Dental Association to review the case. On the grievance form Williams's mother noted Williams's symptoms and asked whether those problems would have worsened, as they did, had the Doctor taken other actions. The Dental Association asked Williams's parents to allow an examination by one of its orthodontists, but the parents declined to allow the examination because the Association could not accommodate their request to have the exam done by someone with TMJ experience.

The Association concluded its review in December 2003 and did not find the Doctor negligent. The family then brought this case before the state Department of Insurance in December 2004. A medical review panel found the Doctor met the applicable standard of care, then Williams brought her complaint for damages in the Marion County Superior Court. That court found there was no issue of fact as to whether the limitations period had expired, and granted summary judgment for the Doctor.

Parties' Arguments

Williams argues the court should not have applied the two year limitations period as it did, because she could not have discovered the malpractice during the two years after the Doctor last treated her. Williams and her family suspected malpractice, but had no medical evidence or expert confirmation until after two years had passed.

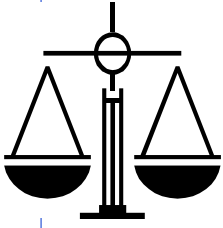
The Doctor notes Williams's condition was not "latent" – her symptoms were obvious and had worsened under the Doctor's care. Williams had been treated by other doctors and had told some of those doctors she thought Dr. Adelsperger's treatment was insufficient. Therefore, the Doctor says, Williams had, within the limitations period, learned facts that could have led to the discovery of any malpractice.

Williams next argues the Doctor tried to fraudulently conceal her malpractice by telling Williams her treatment had been appropriate, and by discouraging Williams from seeing certain specialists who might have exposed the malpractice. This concealment, she argues, stopped the limitations period from running.

The Doctor argues there was no fraudulent concealment because the Doctor did nothing to conceal the potential for a malpractice claim, and there was no evidence the Doctor's comments or actions were intended to mislead Williams or prevent her from inquiring about a claim. She notes Williams made a formal complaint to the Dental Association, indicating Williams knew she had a potential claim.

Anna Williams, et al. v. M. Jayme Adelsperger, D.D.S.

CASE SYNOPSIS



Glossary

Defendant: The party sued in a civil lawsuit or the party charged with a crime in a criminal prosecution. In this civil lawsuit, the defendant is Dr. Adelsperger.

Medical Malpractice: Conduct of a medical professional that does not meet the standard of professional competence and harms the patient.

Plaintiff: The party who initiates a lawsuit by filing a complaint against the defendant. Here, the plaintiff is Anna Williams, who was Dr. Adelsperger's patient.

Summary Judgment: A ruling that there are no factual issues that need to be tried, so the case can be decided by the judge without a trial. A summary judgment is based on a motion by one of the parties that contends all necessary factual issues are settled or so one-sided they need not be tried. Here, the trial court granted summary judgment for Dr. Adelsperger on the ground Williams brought her lawsuit too late.

Statute of Limitations: A requirement that a lawsuit be filed within a specified period of time after a legal right has been violated.

TMJ: Temporomandibular joint and muscle disorders, commonly called "TMJ," are a group of conditions that cause pain and dysfunction in the jaw

joint and the muscles that control jaw movement. TMJ can affect a person's ability to speak, eat, chew, swallow, make facial expressions, and even breathe.

Medical Review Panel: No malpractice lawsuit may be brought in court unless the proposed complaint has first been presented to a medical review panel and the panel gives its opinion as to whether there was malpractice. A medical review panel consists of one attorney and three health care providers. The attorney is chairman of the panel but doesn't vote.

Trigger Date: The date when the limitations period is activated.

Fraudulent Concealment: A remedy that prevents a defendant from using the statute of limitations as a defense. Under the doctrine, a defendant who has prevented a plaintiff from discovering an otherwise valid claim, by violation of duty or deception, may not raise a statute of limitations defense. To invoke the doctrine of fraudulent concealment in a medical malpractice case, the patient must show the doctor's concealment of information somehow prevented her from inquiring into or investigating her condition, thus preventing her from discovering she could bring a malpractice action

Toll (a limitations period): To abate, or stop the running of, a limitations period.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County) Presiding

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained by election in 2000. Born in Decatur County, Judge Bailey was raised on the family farm homesteaded by his ancestors over 150 years ago. He earned his B.A. from the University of Indianapolis; his J.D. from Indiana University School of Law at Indianapolis; and his M.B.A. from Indiana Wesleyan University.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution Committee. Additionally, he served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center. He is also a certified civil mediator.

Judge Bailey was also the first Chairperson of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall

Shepard Award for his pro bono contributions. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. In February of 2006, he served as the Distinguished Jurist in Residence at Stetson University College of Law, and in 2007-08, he was the Moderator of the Indianapolis Bar Association's Bar Leader Series. Currently, Judge Bailey is a member of the Supreme Court Committee on Rules of Practice and Procedure and the Judicial Education Committee of the Judicial Conference of Indiana; he again serves on the Board of Managers of the Indiana Judges Association, now as the Appellate District member.

A strong supporter of law-related education, Judge Bailey teaches government classes at the University of Indianapolis. He is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs. He and his wife have two children.

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University—South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Governors from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, as Chair of the Appellate Practice Section from 2007 to 2008, and as Secretary to the Board of Governors from 2008 to 2009. In addition, she was a

member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from 2001-present. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

In 2005, Judge May was appointed to the Indiana Pro Bono Commission. In July of 2008, she was named as Chair of that Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

“Appeals on Wheels”

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Nancy H. Vaidik (Porter County)

- Judge of the Court of Appeals since February 2000

Nancy H. Vaidik was appointed to the Court by Governor Frank O'Bannon on January 19, 2000. Judge Vaidik, who grew up in Portage, Indiana, graduated from Valparaiso University with High Distinction in 1977 and Valparaiso University School of Law in 1980.

Prior to her elevation to the appellate court, Judge Vaidik served as a trial court judge in Porter County for seven years. She began her legal career with the Porter County Prosecutor's Office, achieving the status of chief deputy prosecutor before joining the law firm of J.J. Stankiewicz and Associates.

Judge Vaidik is a former adjunct professor of law at Valparaiso University School of Law and is currently an adjunct professor of law at Indiana University School of

Law in Bloomington. She teaches for the National Institute for Trial Advocacy and the College of Law of England and Wales. She is the former president of the Indiana Judge's Association and has received numerous awards, including the Indiana Domestic Violence Coalition Judge of the Year and the Paragon of Justice award from the BLSA and HLSA chapters at Valparaiso University School of Law.

Judge Vaidik, who was retained on the Court by election in 2002, is married and has two daughters.

The Court of Appeals hears cases in three judge panels. Panels rotate three times per year, and each case is randomly assigned.

The 15 members of the Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals has held over 250 "on the road" cases since early 2000.

Court of Appeals opinions are available online at
<http://www.in.gov/judiciary/opinions/appeals.html>

ATTORNEYS FOR THE PARTIES

For Appellant, Anna Williams et al.:

Neal F. Eggeson, Jr.
Eggeson Appellate Services
Indianapolis



Neal F. Eggeson earned his B.A. from Butler University in 1995, graduating *cum laude* with High Departmental Honors after only six semesters. Thereafter, Mr. Eggeson attended Cornell University where he earned his J.D. as well as an M.A. in Philosophy. While at Cornell, Mr. Eggeson served on the Cornell International Law Review, he won the 1998 Cornell Moot Court Winter Cup, and he earned the Ralston R. Irvine award for Legal Writing.

Since returning to Indiana, Mr. Eggeson has focused exclusively on civil jury trial and appellate practice. After devoting many years to insurance defense litigation, Mr. Eggeson opened his own law firm which provides legal research and writing services to attorneys throughout the state. Mr. Eggeson's writings on negligence law have appeared in the *Indiana Law Encyclopedia*,

the *Indiana Lawyer*, and *Res Gestae*, and he is the 2006 winner of the Harrison Legal Writing Award from the Indiana State Bar Association. Mr. Eggeson has argued appeals in the Indiana Supreme Court, the Indiana Court of Appeals, and the Seventh Circuit Court of Appeals; additionally, Mr. Eggeson has briefed appeals in the Sixth Circuit Court of Appeals and the United States Supreme Court. Mr. Eggeson has earned the designation of "Master Advocate" from the National Institute of Trial Advocacy, and he is a member of MENSA.

In his free time, Mr. Eggeson volunteers with the Hamilton County Guardian *ad litem* program, and he teaches Legal Analysis, Research & Communication as an Adjunct Clinical Professor of Law at the Indiana University School of Law - Indianapolis.

For Appellee, M. Jayme Adelsperger, D.D.S.:

John M. McCrum
Eichhorn & Eichhorn, LLP
Hammond

John McCrum graduated from Butler University in 1977, and he received his J.D. in 1981 from Indiana University School of Law —Indianapolis. He was admitted in the Indiana Bar and the U.S. District Court, Southern District of Indiana in the same year. Then in 1983, he was admitted in the U.S. District Court, Northern District of Indiana, and in 1996, he was admitted into the U.S. Court of Appeals for the Seventh Circuit.

Mr. McCrum areas of practice include: litigation, professional liability, medical malpractice defense, dental

malpractice defense, legal malpractice defense, municipal law, labor and employment law, worker's compensation defense, and appellate practice. He is a member of the Seventh Circuit and Indiana State bar Associations, Lake and Porter County Bar Associations, Indiana Bar Foundation, Defense Trial Counsel of Indiana, and Defense Research Institute.

Mr. McCrum was on the Board of Directors of the Defense Trail Counsel of Indiana from 2001-2007. He is also a fellow of the American Board of Trial Advocates.